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In The
SUPREME COURT OF THE UNITED STATES

ZORA ENTERPRISES, INC.; JOSEPH P. ZORA; and
GLENNA M. ZORA
Petitioner(s),

v.

TOWN OF MARION and JOHN ROCKWELL.
Respondents,

On Petition For A Writ Of Certiorari
To The Supreme Judicial Court For
The Commonwealth Of Massachusetts

PETITION FOR WRIT OF CERTIORARI

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5788

QUESTION PRESENTED FOR REVIEW

1. Are the municipal defendants liable for a taking by delay when their statements and conduct show that their actions in the Massachusetts Department of Environmental Protection proceedings were taken in bad faith?

PARTIES

All parties are named in the caption.

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CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS

Judgment and Memorandum of Decision in the Plymouth Superior Court (docket no. 90-2247B)
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JURISDICTION

The Petitioners seek review of a decision of the Massachusetts Supreme Judicial Court dated May 28,1999 which denied the Petitioner's Petition for Further Appellate Review.

Jurisdiction is conferred by 28 U.S.C. 1257.

The following provision of the Fifth Amendment to the U.S. Constitution is involved in this case:

"...nor shall private property he taken for public use without just compensation."

Statement of the Case

Statement of Facts

The Zora property is located in the Town of Marion in a zoning district known as "Residence B," which permits a single family residence on a lot having a minimum area of 30,000 square feet and a minimum frontage of 120 feet. Part of the land is less than 14.5 feet in elevation above sea level and as such is in a flood zone under the National Flood Insurance Program administered by the Federal Emergency Management Agency. The property is not served by the town sewer system and on-site septic systems are necessary for the development of house lots. The land does have town water for each lot. As to the property in controversy, only Lot 21 is owned by the individual Plaintiffs, Joseph P. Zora and Glenna M. Zora.

In 1985 Zora Enterprises owned approximately 58 acres of the land.

Since 1985 Zora Enterprises has subdivided its property on 5 occasions and thereby created 45 house lots. All the plans creating these lots were approved by the Town of Marion Planning Board.

A. On May 12. 1986 Zora Enterprises recorded a subdivision plan dated October 21, 1985 for a 15 lot subdivision located at the lower end of Old Knoll Road. This plan shall be

referred to as the "Extension of Old Knoll Road." To date none of these lots have been sold.

B. On October 7,1987 Zora Enterprises recorded a subdivision plan dated July 16,1987 for a 4 lot subdivision which is located at the upper end of Olde Meadow Road and which in conjunction with the subdivision plan referenced below in subparagraph D. shall be referred to as the "Extension of Olde Meadow Road". To date 3 of these lots have been sold, but two of the Buyers have sued Zora Enterprises and Joseph P. Zora, Sr. because Zora Enterprises has been blocked by the Town of Marion and the Commonwealth of Massachusetts from constructing the road for the two lots owned by these Buyers. The third buyer was also unable to build and Zora Enterprises has traded another lot for the original lot sold to this third buyer.

C. On May 16. 1989 Zora Enterprises recorded a subdivision plan dated April 20. 1989 for a two lot division of land consisting of Lots 91 and 92 on Upland Way. One of these lots was sold to an adjacent landowner. The other lot was later exchanged with the third buyer in the Extension of Olde Meadow Road subdivision mentioned above.

D. On August 2,1989 Zora Enterprises recorded a subdivision plan dated November 30, 1988 for a 18 lot subdivision which is located at the upper end of Olde Meadow Road and which in conjunction with the subdivision plan referenced above in subparagraph B. shall he referred to as the "Extension of Olde Meadow Road". To date one of these lots has been sold.

E. On November 24, 1992 Zora Enterprises recorded a plan dated November 6,1992 which created 6 house lots. This plan shall be referred to as "Upland Way". This subdivision was not the subject of this lawsuit, but the subdivision is mentioned here to give an overview of all of the Zora projects. Four of these lots have been sold to date.

The subject matter of this case are the two subdivisions

known as Extension of Olde Meadow Road and Extension of Old Knoll Road, a single lot known at lot 3 on Old Knoll Road and a lot known as Lot 21 on Old Knoll Road. The procedural history of these lots from 1987 to August 6, 1996 is set forth in detail in the Affidavit of Joseph P. Zora, Sr. which was filed in the state trial court. The conduct and statements on which Zora relies to show bad faith on the part of the defendants can be summarized as set forth below.

GENERAL

1. In December 1985 Joyce West, then a member of the Marion Conservation Commission made statements to the effect that Zora's land would not be approved for any development by the Town of Marion Conservation Commission.

2. The Defendant Rockwell (at a time when he was a member of the Marion Conservation Commission) made false statements to a back hoe operator engaged by Zora that Zora had falsified percolation test data.

3. In November 1988, the Plaintiff Joseph Zora, Sr. and his son approached Edwin H.B. Pratt, a Town of Marion selectmen and member of the Town of Marion Board of Health, to ask for a copy of proposed changes to BOH regulations, and Mr. Pratt stated "you Zora's are a bunch of assholes...you just want to run against me for Selectman."

RYDER

1. At a hearing for the Ryders, who were prospective purchasers of one of the Zora lots, Janice Mendes made a statement to the effect that Marion Conservation Commission intended to stop Zora's from building on their property. This statement was made in the presence of other Marion Conservation Commission members, including John Rockwell, and none of them objected to or denied the statement.

2. In March 1985, the Defendant Rockwell, then a member of the Marion Conservation Commission dug holes on the Ryder lot supposedly to determine the level of maximum high ground-

water, without any permission or notice to Zora Enterprises. Rockwell admitted that he did not have qualifications at that time to determine the water table.

LOT 21A

1. On or about September 22, 1986, the defendant Rockwell telephoned the DEP Southeast Region office and told them that Zora's were "working in a stream". No such work was being done. As a result of this complaint DEP issued an enforcement order which was not dismissed until February 23. 1994.

LOT 3, OLD KNOLL RD.

1. The defendant Rockwell refused to disqualify himself from the proceedings even though his statements to the back hoe operator showed a lack of impartiality.

2. The Marion Conservation Commission raised issues (groundwater level relative to septic system and the wetlands replication plan) in their Request for Adjudicatory hearing for the first time. Also, the position taken by the Marion Conservation Commission contradicted a May 8, 1986 opinion of Town Counsel, that except in very narrow circumstances the Conservation Commission did not have authority to regulate septic systems.

3. In a memorandum dated September 21, 1988 from the Marion Conservation Commission to the Marion Board of Health, the Conservation Commission stated that because the Conservation Commission had filed for adjudication no work could be done on the lot until the matter is resolved - "often several years."

EXTENSION OF OLD KNOLL ROAD

1. Once again the defendant Rockwell refused to disqualify himself from hearing this matter even though he was not impartial.

2. On December 16,1987 at a hearing on the Notice of Intent before the Marion Conservation Commission, the def-

endant John Rockwell, then the chairman of the Conservation Commission stated that "there is no question the road is going in, it is just a question of where, but I do not want to issue orders of condition to allow the project without unlimited access [for the Conservation Commission to the project site]. The Defendant Rockwell also stated "we [Conservation Commission] could ask DEQE [Department of Environmental Quality Engineering now Department of Environmental Protection or DEP] to remand the project back to the Marion Conservation Commission and in 5,10 or 15 years maybe the project would go forward.

3. Also at the December 16, 1987 hearing. Kay Reis, a member of the Marion Conservation Commission stated that "if we [Conservation Commission] don't get all that we request we should use the administrative process to delay any project".

4. Nancy Menzel, another member of the Marion Conservation Commission, stated at the December 16. 1987 hearing that it was pretty clear the road was going in, but that it would take several on site inspections or several months, and if the Conservation Commission was not allowed to do these on sites the Conservation Commission would not close the hearing.

5. On October 1, 1992 a hearing was held before an Administrative Law Judge of DEP on the Request for Adjudicatory Hearing of the Marion Conservation Commission. During a break in these proceedings there was a conversation between Elizabeth Kimball (DEP. Assistant General Counsel), Lenore White (DEP engineer). John Rockwell and Attorney Thomas Crotty (counsel for the Town of Marion). In that conversation Kimball and White both said to Rockwell "you've held these people up for 7 years, they have a viable project, what do you want from them?" Rockwell did not respond to this question.

EXTENSION OF OLDE MEADOW ROAD

1. The Defendant Rockwell stated that if Zora Enterprises

did not supply a plan (showing a wetlands line severely at odds with the delineation supported by the experts engaged by Zora) the project would he denied. Rockwell further stated that even if the plaintiffs provided this information the project would be denied.

Zora's contend that the administrative delays in this case have not been normal. The total length of administrative proceedings has been as follows:
Lot 3, Old Knoll Road: Over seven years:
Lot 21A, Old Knoll Road: Seven and 1/2 years;
Extension of Old Knoll Road: Seven and 1/2 years;
Extension of Olde Meadow Road: Over seven years. In the opinion of Joseph P. Zora. Sr., if the projects had been developed with only normal administrative delay's, the property would have had a fair market value of $3,000,000.00.

Federal Question Raised

The Petitioners first raised the issue of a taking in violation of the Fifth Amendment to the U.S. Constitution in their Complaint filed within the Plymouth Superior Court, the state trial court. (docket no. 90-2247B) on October 31, 1990. The complaint was subsequently amended on or about November 7,1991, but still contained the Fifth Amendment taking claim. The Defendant-Respondents moved for summary judgment. The state trial court allowed the Motion for Summary Judgment as to all claims, including the Fifth Amendment claim. The grounds for the trial court's decision were that the Town did not cause the DEP delay, that Zora's property was not permanently destroyed making exhaustion of administrative remedies ineffectual, that Zora filed to exhaust its administrative remedies, and the Town is not responsible for a taking of Zora's property. See Memorandum of Decision and Order on Defendants' Motion for Summary Judgment dated November 26,1996. A-1. The Petitioners appealed to the Massachusetts Appeals Court from the judgment, and one of the issues on

appeal was whether the delays which petitioner's attribute to the defendants caused a taking in violation of the Fifth Amendment. This issue was raised in the Petitioner's Brief to the Appeals Court. In a decision dated March 30, 1999, the Appeals Court affirmed the trial court decision "primarily for the reason that the plaintiffs failed to show the town was responsible for the delays of DEP" and "For essentially the reasons set forth in the judge's comprehensive memorandum of decision and order on the defendants' motion for summary judgment dated November 26,1996." See Appeals Court decision (docket no. 97-P-324). A. - 35. The Petitioners then filed a Petition for Further Appellate Review: with the Massachusetts Supreme Judicial Court, which is the highest court of Massachusetts. Again, the Petitioners raised the Fifth Amendment taking issue. This Petition was denied by the Supreme Judicial Court (docket no. FAR 10560). A.-39

Argument

I. The Massachusetts courts have not given true recognition to regulatory takings claims.

It has been 75 years since Justice Holmes' formulation in the case of Pennsylvania Coal Co. vs. Mahon. 260 U.S. 393, 43 S. Ct. 158 (1922) of the concept that in certain cases governmental regulation could go too far and cause a taking for which just compensation is mandated under the Fifth Amendment to the U.S. Constitution. During those 75 years, the Massachusetts courts have recognized a taking claim on only two occasions. See Wilson vs. Commonwealth. 413 Mass. 352 (1992) and Lopes vs. Peabody. 417 Mass. 299 (1994). Even in those two cases the court ultimately did not find that compensation was due the plaintiffs for a taking of their properly. See Wilson vs. Commonwealth. 41 Mass. App. 1101(1996). In all other instances takings claims under the Fifth Amendment have not been recognized. See e.g. Steinhergh vs.

Cambridge, 413 Mass. 736 (1992); FIC Homes of Blackstone, Inc. vs. Conservation Commission of Blackstone. 41 Mass. App. 681 (1996): Leonard vs. Brimfield. 423 Mass. 152 (1996); Daddario vs. Cape Cod Commission, 425 Mass. 411(1997). There is no effective state law remedy available to plaintiffs for a taking without just compensation
in violation of the Fifth Amendment to the U.S. Constitution, because there is no true recognition of regulatory takings claims under the Fifth Amendment by the Massachusetts courts.

II The Town and Rockwell are not relieved from liability for a taking because of subsequent orders of the Massachusetts Department of Environmental Protection.

Before proceeding on a taking claim directly under the Fifth Amendment of the U.S. Constitution the plaintiff is required to seek compensation under state law. See Gilbert vs. Cambridge. 932 F.2d. 51(1St Cir. 1991); Front Royal and Warren Count Industrial Park Corporation vs. Town of Front Royal, 922 F. Supp. 1131 (W.D. VA. 1996). This rule applies unless the remedy available under state law is so illusory as to call for a departure from the usual rule. Ackerley Communications of Massachusetts, Inc. vs. City of Somerville. 692 F. Supp. 1 (D.Mass. 1988). The Plaintiff has brought a claim under G.L. c. 79:10. While this statute provides the procedure for recovering damages, the statute does not provide the right to recover for a taking. The right to recover for a taking must be established under some other statute or constitutional definitions of a taking. Cayon vs. Chicopee. 360 Mass. 606. 608 (1971); Fram vs. City of Boston, 363 Mass. 68, 72(1973).

Zora Enterprises contends that the Fifth Amendment to the U.S. Constitution is a constitutional provision under which a taking claim can be established for purposes of invoking the procedures of G.L. c. 79:10.

The U.S. Supreme Court in the case of First English Evangelical Lutheran Church of Glendale vs. County of Los

Angeles, California. 107 S. Ct. 2378 (1987) recognized that compensation must he paid when the government has taken property by a land-use regulation even in cases in which the taking is temporary. The regulation in the Lutheran case was ultimately found to be invalid, and the time period in question was between the date of the imposition of the regulation to the date that the regulation was declared invalid.[1] The court stated that:

> "We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us."

This statement suggests that in cases of administrative delays which are not normal, a court could find that a taking had occurred. The Supreme Judicial court held in the case of Wilson vs. Commonwealth. 413 Mass. 352 (1992), that unreasonable agency delay itself could cause a taking. Though the facts of Wilson were that the houses in question were physically destroyed the case does not explicitly state that taking by delay is actionable only in the same circumstances.

The Town and Rockwell did not contest this legal theory in their Motion for Summary Judgment and supporting materials. The Town and Rockwell also did not contest Zora's

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[1]The Lutheran case was decided after the cases U.S. Supreme Court cases of Williamson County Regional Planning Comm'n vs. Hamilton Bank of Johnson City. 473 U.S. 172 (1985); United States vs. Riverside Bayview Homes. 474 U.S. 121 (1985); and McDonald, Sommer & Frates vs. Yolo County, 477 U.S. 340 (1986) which are generally cited in support of the proposition that a final decision is an essential element of plaintiffs regulatory taking claim.

contention that the delays were unreasonable. Instead, the Town and Rockwell claimed that because the Orders of Conditions of the Town of Marion Conservation Commission were "replaced" with subsequent Massachusetts Department of Environmental Protection ("DEP") Superseding Orders of Condition that the Town and Rockwell are not responsible for any delay that occurred after the DEP orders issued. This argument is without merit because the Town and Rockwell were well aware of the length of time which DEP appeals took. Statements made by members of the Marion Conservation Commission show a scheme to intentionally use the known delays in the DEP proceedings to prevent the Plaintiffs from using their land. By taking appeals in the Lot 3 and Extension of Olde Meadow Road cases the Town and Rockwell put the lengthy appeals processes in motion. By making a false complaint to DEP about "work in a stream" on Lot 21A, the Town and Rockwell caused a DEP Enforcement Order to issue. The Defendants also initially and in bad faith took the position that Zora's should submit a plan at Zora's expense showing a highly contested (and ultimately erroneous) wetlands line, which forced Zora to take an appeal in the Extension of Olde Meadow Road case.

CONCLUSION

For the reasons set forth above the Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED
PETITIONERS
ZORA ENTERPRISES, INC.
JOSEPH P. ZORA; and GLENNA M. ZORA
By their Attorney

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APPENDIX A

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT CIVIL ACTION

PLYMOUTH, ss NO:90-2247B

ZORA ENTERPRISES, INC., ET ALS,)
)
Plaintiff(s))
)
v.)
)
TOWN OF MARION, ET AL.)
)
Defendants)
)

JUDGMENT - (SUMMARY)
(PURSUANT TO MASS R. CIV. P. 56)

This action came on before the court, O'NEILL, J. presiding, upon a motion of the defendants Town Of Marion and John Rockwell for summary judgment and the court after hearing issued a Memorandum of Decision and Order dated November twenty-sixth, nineteen hundred and ninety six on said defendants motion, it is therefore ORDERED and ADJUDGED as follows:

that for the reasons set forth in the Memorandum of Decision and Order that Summary Judgment enter in favor of the defendants the Town of Marion and John Rockwell.

Dated at Plymouth, Massachusetts, December 17, 1996

/s/ Francis R. Powers
FRANCIS R. POWERS
Clerk of Courts

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT CIVIL ACTION

PLYMOUTH, ss NO:90-2247B

ZORA ENTERPRISES, INC.,)
& Others[1],)
vs)
)
TOWN OF MARION & another,[2])
)

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter comes before the court on a motion for summary judgment. The plaintiff, Zora Enterprises, Inc., Joseph P. Zora and Glenna M. Zora (collectively, "Zora"), has filed the underlying action against the Town of Marion (the "Town") and John Rockwell ("Rockwell") principally claiming the Town, through the Marion Conservation Commission (the "Commission") has taken Zora's property without just compensation in violation of Zora's rights guaranteed under the Fifth Amendment of the United States Constitution and Article Ten of the Massachusetts Declaration of Rights. Zora further asserts that the Town and its officials have violated G.L. c. 12, § 11I and tortiously interfered with third party contracts and prospective purchasers of Zora's land. In addition, Zora claims the actions of the Town constitute a taking for the public use entitling Zora to compensation pursuant to G.L. c. 79. Zora seeks declaratory judgment on several issues.

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[1]Joseph P. Zora and Glenna M. Zora
[2]John Rockwell

The Town and Rockwell now move for summary judgment on the grounds that, as a matter of law, Zora fails to establish that a taking by the Town was achieved and that the Town and Rockwell violated Zora's due process rights. Furthermore, Rockwell is immune from suit under a theory of qualified immunity and many of Zora's claims are barred by the statute of limitations.

I. BACKGROUND

For the purposes of this motion, the following are the material undisputed facts. Zora Enterprises, Inc. owned undeveloped land in Marion, Massachusetts (the "Property") primarily for development purposes. Zora's taking claim principally involves administrative proceedings surrounding three proposed development projects. Zora bases its remaining claims on these administrative proceedings along with several decisions and statements made by the Town and its officials in connection with the Property.

A. Lot Three: Old Knoll Road

On June 29, 1987, Zora filed a Notice of Intent with the Commission pursuant to G.L. c. 131, § 40, seeking an Order of Conditions to fill wetlands on Lot 3, Old Knoll Road, Marion Massachusetts. The Notice of Intent proposed construction of a single family home and an associated subsurface sewage disposal system. In order to achieve the 50-foot setback from wetlands required by Title V (310 CMR 15.00) and the 75-foot setback required by local board of health regulations, the design for the septic system required filling wetlands on the rear of the lot. Filling of wetlands is governed by G.L. c. 131, § 40, which requires anyone proposing to "fill, dredge or alter" a wetland must first file a Notice of Intent with the local conservation commission and receive an Order of Conditions before

proceeding. In addition, under Marion Board of Health regulations, the Board of Health must issue a permit allowing the proposed septic system. If necessary, the applicant must obtain a variance from local regulations which require sewage or septic systems to be setback 75 feet from wetlands.[3]

On August 12, 1987, a hearing was held before the Commission and on September 21, 1987, Zora submitted percolation and ground water test information for Lot 3 as requested by the Commission.

On October 7, 1987, the Commission issued an Order of Conditions denying the proposed project, citing, among several reasons, Zora's failure to obtain a variance from local regulations requiring a 75 foot setback for a subsurface sewage disposal system.[4] Zora appealed[5] this decision by filing a Request for

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[3] Marion Board of Health regulations provide in part "No subsurface sewage leaching system or septic tank shall be constructed within seventy-five feet of...any wetland...without the prior written approval of the Marion Board of Health."

[4] The October 7,1987 Order of Conditions also cited the following reasons for denying approval of the project: 1. Isolated Land Subject to flooding as labeled, is hydraulically connected to the area of Bordering Vegetated Wetland and is a Bordering Vegetated Wetland; 2. Commission understands that DEP policy prohibits Filling of Bordering Vegetated Wetland for Title V setback; 3. Delineation of the Bordering Vegetated Wetland is in error for not including an area on the north west area of the Bordering Vegetated Wetland; 4. Plan lacks percolation test and observation hole location information; 5. Credible evidence from a competent source required to be provided to show the extent of fill during the last three years; and 6. Any fill shown to have been placed in a wetland area in special order #5 shall be removed and the wetlands replicated in compliance with the Wetlands Protection Act, G.L. 131, § 40, regulation 310 CMR: 10.55 (4)(b).

[5] An applicant seeking to overturn an Order of Conditions applies to the DEP within 10 days for a Superseding Order of Conditions. G.L. c. 131, § 40.

Superseding Order of Conditions with the Department of Environmental Protection (the "DEP"), (formerly the Department of Environmental Quality Engineering ("DEQE") on October 14, the Department of Environmental Quality Engineering ("DEQE") on October 14, 1987. On December 1, 1987, a DEP representative conducted an on-site inspection of Lot 3 and on June 1, 1988, issued a Superseding Order of Conditions overturning the Commission's Order of Conditions and allowing Zora to fill a portion of the wetlands in order to comply with Title V. On June 12, 1988, the Commission filed a Request for Adjudicatory Hearing from the Superseding Order of Conditions, appealing the DEP's orders. On October 24, 1994, an Administrative Law Judge ("ALJ") denied filling of wetlands on Lot 3 on the basis that the engineering plans failed to show maximum ground water levels and thus did not qualify for a presumption under DEP regulations that wetlands would be protected. Zora appealed the decision of the ALJ to Superior Court and on August 13, 1996, Tierney, J. affirmed the decision of the ALJ and dismissed Zora's regulatory taking claim against the DEP.

At the time Zora was seeking an Order of Conditions from the Commission for the purposes of Title V, the Board of Health issued a permit to Zora on October 7, 1987, for construction of the subsurface sewage disposal system. The Board of Health revoked the permit on November 1 8, 1987, on the basis that the reserve area was less than 50 feet from wetlands, violating Title V and local Board of Health regulations.

Following the Commission's appeal from the DEP's Superseding Order, Zora renewed its application for the Disposal Works Construction Permit with the Board of Health on August 30, 1988. On December 13, 1988, the Board of Health denied Zora's application for a septic system permit and associated

variances on the ground that the proposed system failed to meet the Title V (310 CMR 15.00) 50 foot setback requirement. Zora did not have a final order under the Wetlands Protection Act permitting filling the wetlands since the Commission appealed the DEPs Superseding Order of Conditions. The Board of Health notified Zora that "if conditions change on the lot after a final order has been issued by the Department of Environmental Quality Engineering, the application may reapply to the Board of Health."

On January 10, 1989, Zora appealed the denial of the Board of Health permit to Superior Court and Mathers, J. decided on July 22,
1993, that the Board of Health properly denied Zora's application for a variance. On Zora's appeal, the Appeals Court affirmed the Superior Court Judgment.

B. <u>15 Lot Subdivision: Extension of Old Knoll Road</u>

On October 30, 1987, Zora filed a Notice of Intent with the Commission for a limited project[6] involving the construction of a roadway and associated drainage and utilities for a fifteen lot subdivision.

A hearing was held on November 12,1987 before the Commission and an on-site inspection occurred on November 27,1987. The hearing was continued to December 2,1987, at which time the Commission requested additional information from Zora. The hearing was again continued to December 16, 1987. At the December 16 hearing, the Commission requested further on-site inspections, however, Zora declined to permit the continuance of the hearing for the purposes of any

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[6] DEP regulations provide that an Order of Conditions may be issued permitting specified limited projects, including the construction of a new roadway. 310 CMR 10.53 (3)(e).

inspection.[7]

An Order of Conditions dated December 31, 1987, was issued denying without prejudice the project on the basis that, among other reasons, the applicant denied the Commission access to the property required in order to answer questions raised by the Notice of Intent.[8]

On January 8, 1988, Zora filed a Request for Superseding Order of Conditions with the DEP appealing the Commissions decision. An on-site inspection occurred on March 1, 1988, with a DEP engineer and Commission member, John Rockwell.[9]

The DEP issued a Superseding Order of Conditions on April 19, 1989, allowing extension of the road under a revised plan

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[7] The Commission engaged in deliberations following the hearing. Several statements were made by members of the Commission including the following: John Rockwell stated "there is no question the road is going in, it is just a question of where, but I do not want to issue orders of conditions to allow the project without unlimited access" and "we could ask DEQE to remand back to the Marion Conservation Commission and in five, ten or fifteen years maybe the project would go forward;" Kay Reis stated "if the Commission doesn't get all that we requested, we should use the administrative process to delay any project;" Nancy Menzel stated "it was pretty clear the road was going in but that it would take several on-site inspections or several months and if the Conservation Commission was not allowed to do these on-site inspections, the Conservation Commission would not close the hearing."

[8] In addition, the Order of Conditions denied the project on the basis that the wetland delineation show on the plan did not accurately represent the Bordering Vegetated Wetland within 100 feet of the proposed activity and the project did not qualify for limited project status under 310 CMR 10.53(3)(e).

[9] During the inspection, Rockwell stated that the Commission would appeal if the Commission was denied further access.

dated January 19, 1989. Special conditions of the order included a specification that "members and agents of the local Conservation Commission and the Department shall have the right to enter and inspect the property at all reasonable times to evaluate compliance with the conditions stated in [the] Superseding Order, and may require the submittal of any data deemed necessary by [the] Department for that evaluation."

On April 26, 1989, the Commission filed a Request for Adjudicatory Hearing appealing the DEP orders. A hearing was held before an Administrative Law Judge of the DEP on October 1, 1992.[10] A tentative decision was issued on February 7, 1994, and on March 28, 1995, a Final decision was entered reversing the decision of the DEP and denying the project. Zora has appealed the decision of the Administrative Law judge to the Superior Court.

C. <u>21 Lot Subdivision: Extension of Olde Meadow Road</u>

On July 13, 1989, Zora filed a Notice of Intent with the Commission for the construction of a road and associated utilities for a 21 lot subdivision. With the Notice, Zora filed plans prepared by a professional engineer representing construction and installation of utilities and the drainage system. The plan also delineated wetlands as flagged by Zora's consultant. Subsequently, an on-site inspection took place at which time the Commission placed flags delineating wetlands. At a hearing on September 6, 1989, the Commission requested that Zora prepare a plan at Zora's expense showing wetlands

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[10] During a break at the hearing, Joseph Zora, Sr. overheard a comment made by the DEP assistant general counsel and another person to John Rockwell and counsel for the Town essentially stating "you've held these people up for seven years, they have a viable project, what do you want from them". Joseph Zora, Sr. observed that Rockwell did not respond to the comment.

flags as placed by the Commission. Zora declined. At the hearing, Rockwell stated that if Zora does not supply the plan, the project would be denied.

On September 26, 1989, the Commission issued an Order of Conditions denying the extension of the road. The Order enumerated several reasons for denying the project, including the application's failure to exhibit on a plan the wetland flags as placed by the Commission.[11] Zora requested a Superseding Order of Conditions from the DEP on October 4, 1989. The DEP conducted on-site inspections and placed flags delineating wetlands areas. The DEP requested that Zora prepare a plan showing the wetlands area as determined by the DEP. On September 17, 1990, the DEP issued a Superseding Order of Conditions denying the project without prejudice for failure to submit information, including plans accurately showing all of the wetland resources on the property in accordance with the Wetlands Protection Act.

On September 24, 1990, Zora filed a Request for Adjudicatory Hearing appealing the DEP orders and on October 14, 1994, an Administrative Law Judge overturned the DEP orders, finding that the grounds on which the DEP denied the project for insufficient information were improper. The case was remanded to the DEP for a decision on the merits whether to permit or deny the project.

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[11] The Order specified seven deficiencies. In addition, the Order outlines fourteen additional reasons on the basis of which the Commission believed the project should be denied in the event the Order was appealed tot the DEP.

D. Statements and Administrative Decisions by the Commission and its Members.

In addition, a variety of individual statements and administrative decisions have been made concerning the Property.

In 1985, Zora entered into an agreement to sell Lot 45 of the Property. The buyer filed a Notice of Intent with the Commission for the construction of a home and subsurface sewage disposal system. At the hearing on the Notice of Intent, Commission member Janice Mendes stated "the Conservation Commission intended to stop the Zora's from building on their property." Thereafter, Rockwell and other Commission members entered Zora's property and dug holes to conduct an examination of the land via a "rust line" test. Rockwell had publicly questioned the accuracy of the data resulting from the percolation test submitted with the buyer's Notice of Intent.[12]

Zora hired an engineer to do a second percolation test. A few days after the percolation test, Rockwell asked Robert Pittsley, the backhoe operator who performed work at the second test, "how did they pull that one off? How did the perc test pass on Zora's lot?"

In 1985, Commission member Joyce West stated to Robert Pittsley "It seems as though Mr. Zora thinks he can get away with anything he wants, and Mr. Zora is going to find out that he isn't going to be able to do anything he wants to do."

In 1983 and 1984, Zora sold Lots 30 and 30A of the Property. On October 15, 1984, the Commission issued an Order of

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[12] Rockwell was notified by the DEP that "in all cases the iron oxide level is not an indication of maximum groundwater elevation however good engineering judgement should be utilized in using this information."

Conditions to the buyer for the construction of a single family home and subsurface sewage disposal system. On May 21, 1 986, the Commission issued an Enforcement Order indicating that the septic plan for Lot 30 was in violation of Title V and that a new Notice of Intent was required. In addition, the Commission issued an amended Order requiring a wetlands delineation on Zora's adjoining land.

In December 1985, a prospective buyer spoke with Commission member Joyce West regarding the purchase of Lot 52 from Zora. West stated that "Mr. Zora is not well received by this committee" and "Mr. Zora knows that the land is wet, and I know the particular land and it is very wet, and I don't understand how it could pass the Conservation Commission. At the very least Mr. Zora will have to come before me for the road and there is no way in the world that I see the road passing. If you are thinking of an immediate timetable for building, you will not make this timetable." West further stated that "the beauty of the area will be greatly diminished and I don't understand why Mr. Zora did not tell you this," and "In dealing with

Mr. Zora you should get a good lawyer and have the lawyer draw an agreement that would be conditioned on the lot being buildable and getting past the conservation commission and to be very careful in dealing with him."

In January 1984, Zora sold Lot 43 of the Property to a buyer who built a house on the parcel and subsequently sold the lot to another parw. On August 25, 1936, Joyce West made statements that the house on Lot 43 was sinking into the ground.

On September 15, 1986, the Commission issued a Cease and Desist Order against Zora for "altering a Bordering Vegetative Wetlands [("B.V.W.)] and working in a stream." Following this

order, 1986, Rockwell contacted the DEP alleging that Zora was altering a B.V.W. and working in a stream. The DEP issued an Enforcement Order on October 31, 1986, directing Zora to cease and desist alteration of a B.V.W. without a valid Order of Conditions and requiring Zora to file a Notice of Intent with the Commission and the DEP. Zora appealed the DEP Order on November 13,1986. In 1994, the DEP filed a Withdrawal of Enforcement Order and Dismissal of Claim and on April 5, 1994, an Administrative Law Judge entered a Final Decision - Order of Dismissal dismissing the appeal as moot since the Enforcement Order was withdrawn. Finally, John Rockwell told a neighbor and prospective purchaser of Lot A, owned individually by Joseph Zora Sr. and Glenna Zora, that Lot A could not be built on.

Zora filed a complaint on October 31,1990, and a second amended complaint on May 22, 1991, claiming that the Commission frustrated the corporation's attempts to proceed with the three projects by using the DEP administrative appeal process to delay the projects. In addition, Zora claims that the various statements and administrative decisions made by the Commission over the years were designed to harass and prevent the development of their property. Zora claims that the Commission prevented Zora from making any economically viable use of their property which resulted in a taking without just compensation in violation of the Fifth Amendment and Article Ten of the Massachusetts Declaration of Rights. Further, Zora maintains the actions of the Commission and John Rockwell interfered with Zora's constitutional rights under the federal and state constitution in violation of G.L. c. 12, § 11I. Zora claims the Town and John Rockwell tortiously interfered with Zora's third party contracts and "with prospective purchasers." Finally, Zora maintains they are entitled to compensation pursuant to G.L. c. 79. The Town moves for

summary judgment on the basis that as a matter of law:

1. Zora cannot establish that its property was taken by the Commission's refusal to grant wetland permits for the three projects since the Commission's orders were replaced by Superseding Order of Conditions issued by the DEP, thus nullifying the effectiveness of the Commission's orders. In addition, any taking claim is premature since Zora has not exhausted the administrative and judicial review process for the three projects.

2. The Town did not deny Zora due process on the three projects since the Town has no responsibility for delays in the administrative procedures of state agencies and the only actions taken by the Town increasing the length of the DEP proceedings cannot be characterized as a violation of Zora's due process rights.

3. Individual defendant, John Rockwell is immune from suit under the doctrine of qualified immunity since he did not violate any clearly established constitutional right of Zora.

4. The Enforcement Order issued by the Commission in October of 1986 was superseded within a few weeks by a DEP Order and therefore cannot constitute a deprivation of property without due process since it only remained in effect for six weeks. State law provided an adequate remedy for appeal and the claim is barred by the statute of limitations.

5. With the exception of claims based on two appeals of DEP Superseding Orders and the Board of Health's denial of a variance, Zora's claims are barred by the statute of limitations.

II. DISCUSSION

This court grants summary judgment where there are no genuine issues of material facts and where the summary judgment record entitles the moving party to judgment as a matter of law. Community Nat'l Bank v. Dawes, 369 Mass. 550, 553 (1976); Cassesso v. Commissioner of Correction, 390 Mass. 419, 422 (1983); Mass. R. Civ. P. 5 6(c). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, and that the summary judgment record entitles the moving party to "judgment as a matter of law." Pederson v. Time, Inc., 404 Mass. 14,16-17(1980). A party moving for summary judgment who does not bear the burden of proof at trial must demonstrate the absence of a triable issue either submitting affirmative evidence negating an essential element of the nonmoving party's case or by showing that the nonmoving party is unlikely to submit proof of that element at trial. Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991); Flesner v. Technical Communications Corp., 410 Mass. 805, 809 (1991). The nonmoving party cannot defeat the motion for summary judgment by resting on its pleadings and "mere assertions of disputed facts..." LaLonde v. Eisnner, 405 Mass. 207, 209 (1989). The nonmoving party's failure to prove an essential element of its case "renders all other facts immaterial" and mandates summary judgment in favor of the moving party. Kourouvacilis v. General Motors Corp., 410 Mass. 706, 711(1991), citing Celotex v. Catrett, 477 U.S. 317, 322 (1986).

A. Zora's Taking Claim

The Fifth Amendment to the United States Constitution prohibits the taking of private property for public use without just compensation. U.S. Const. amend. V. Similarly, Article Ten of the Massachusetts Declaration of Rights states "no part of

the property of any individual can with justice, be taken from him or applied to public use, without his own consent . . . and whenever the public exigencies require, the property of any individual should be appropriated to public uses, he should receive a reasonable compensation therefor." Art. X Mass. Declar. Rights.[13] It is well established that for purposes of these provisions, a taking may occur even though the government, through a legitimate exercise of its police power, seeks to fulfill its obligation to preserve and protect the public interest via the zoning or building regulation at issue. MacNeil v. Avon, 386 Mass. 339, 341 (1982). In the context of a regulatory taking, the United States Supreme Court has recognized that where regulation denies all economically beneficial or productive use of land, a taking results without case-specific inquiry into the public interest advanced in support of the restraint. Lucas v. So. Carolina Coastal Council, 505 U.S. 1003, 1015 (1992). Temporary deprivations of use are compensable for losses caused by excessive government regulation. First Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304, 319 (1987).

The Town first contends that the Commission's Orders of Conditions issued by the Commission cannot be a taking since each was displaced by the DEP's Superseding Order, thus extinguishing the legal significance of the Commission's Order of Conditions. Zora claims that the Town is not relieved from liability for a taking where subsequent orders are issued by the DEP since the Town knew of the length of the DEP appeals process and used the delay to prevent Zora from using their land.

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[13] Massachusetts courts utilize the standards of the Fifth Amendment in applying the state takings clause. See Steinbergh v. Cambridge, 413 Mass. 736, 738 (1992), cert. den., 113 S.Ct. 2338 (1993).

G.L. c. 131, § 40 (the "Wetlands Protection Act") provides that:

> where an order. . . issue[s] from [a conservation] commission, the applicant . . . may. . . request the department of environmental protection to determine whether the area on which the proposed work is to be done is significant to public or private water supply, to the groundwater supply, to flood control.... Upon receipt of such request the department shall make the determination requested and shall by written order . . . impose such conditions as will contribute to the protection of the interests described herein . . .Such order shall supersede the prior order of the conservation commission . . . and all work shall be done in accordance therewith . . . . (emphasis added)

"The legislative history of [CL. c. 131, § 40] demonstrates that the legislature has always reserved to the Commonwealth, acting through its various agencies, the final decision on applications for projects affecting statutory concerns as to wetlands protection." Degrace v. Conservation Comm'n of Harwich, 31 Mass. App. Ct. 132, 135 (1991), quoting Hamilton v. Conservation Comm'n of Orleans, 12 Mass. App. Ct. 359, 364 (1981). The specific language of the Wetlands Protection Act further supports the position that the DEP has final determination of projects decided on the basis of § 40 since the DEP's order shall "supersede the prior order of the conservation commission . . . and all work shall be done in accordance therewith." While the local conservation commission is designated with the authority to impose conditions pursuant to the Wetlands Protection Act, G.L. c. 131, the Commonwealth through the DEP has the "final word" on projects approved or disapproved under § 40. Hamilton v. Conservation Comm'n of Orleans, 12 Mass. App. Ct. 359, 368 (1981). Therefore, as it

pertains to any one Order of Conditions, a Superseding Order of Conditions issued by the DEP extinguishes the conditions imposed by the Commission. When a Superseding Order of Conditions is issued, the Commission is not liable for a taking claim based on conditions imposed by the Commission under the Wetlands Protection Act. The proper party for Zora's taking claim with respect to any one Order of Conditions is the DEP. Hamilton v. Conservation Comm'n of Orleans, supra at 368 (1981). (DEQE, and not local authority, would be liable for any taking of land resulting from proceedings under c. 131, § 40, denying landowner permission to proceed with construction of a house as described in notice of intent). Zora does not dispute this conclusion but instead relies predominately on Wilson v. Commonwealth, in support of their claim that the Commission knew and used the delay process inherent in the DEP appeals process to affect a taking.

The Supreme Judicial Court recognized in Wilson v. Commonwealth, 413 Mass. 352, 355 (1992) that an agency may be liable for a regulatory taking through unreasonable and improper delay in agency proceedings. While "[g]enerally, courts have rejected claims that, because an agency did not act more quickly on an application a State or a State agency took a landowner's property," a complaint alleging total destruction of property due to agency delay sufficiently states a claim for a regulatory taking. Wilson v. Commonwealth, 413 Mass. 352, 355 (1992). The Court found that unreasonable agency delay itself would be the basis for the claimant's failure to complete the administrative process and, thus, the cause of the taking. "It would be illogical to permit the agencies own alleged dilatory practices to justify the dismissal of the taking claim for the reason... that departmental proceedings were not completed" and thus it would be inappropriate to require the claimant to exhaust administrative remedies. Wilson v. Commonwealth,

supra at 355-356 (1992).

The taking claim presented by Zora's is not consistent with Wilson and taking cases in general for several reasons. Initially, Zora must show that agency delay occurred. In addition, Wilson requires proof "among other things...that the delay was due to unreasonable agency action and that a favorable department decision within a reasonable time would have resulted in saving the plaintiffs properties from total destruction." Wilson v. Commonwealth, supra at 355 (1992).

First, Zora does not specify any facts that the Town missed any deadlines set by the Wetlands Protection Act and [its] regulations promulgated pursuant thereto. In each case, the Commission denied the proposed projects within the limitations set by § 40.

Zora argues instead that the Commission appealed the DEP's Superseding Orders issued for Lot 3 and the 15-lot subdivision project in "bad faith" and denied issuance of Order of Conditions for the three projects in order to force Zora into the DEP delay process. Had the Town not taken these actions, Zora argues, delay would not have occurred. Zora's arguments are unpersuasive.

Agency delay, however unreasonable, cannot be reasonably attributed to the Town. The agency causing the delay is undoubtedly the DEP and not the Town, Commission or Board of Health.

Moreover, both Zora and the Town are entitled to seek review of DEP Superseding Order of Conditions under G.L. c. 30A. Zora maintains that the Town, by availing itself to the administrative appeals process accomplishes a taking without

just compensation. General Laws, c. 30A provides a right by an aggrieved party who participates in the agency process to seek redress for the agency's actions. Group Ins. Comm'n v. Labor Relations Comm'n, 381 Mass. 199, 202-204, 207 (1980). Clearly, the Town and Zora fall into the category of an aggrieved party and therefore both have a right to seek judicial review.

Furthermore, Wilson involves the unusual case of unreasonable agency delay resulting in the total destruction of property by natural forces. The Court was careful to distinguish total destruction of property from temporary takings, i.e. circumstances where property was not totally deprived of its value. Wilson v. Commonwealth, 413 Mass. 352, 355 (1992). Zora's property was not permanently destroyed by natural forces. Zora still has the right put its property to a variety of alternative uses. See Bello v. Walker, 840 F.2d 1124, 1131(3rd Cir. 1988) (plaintiff denied building permit still had right to put land to variety of alternative uses). Zora fails to indicate facts demonstrating they have been deprived of all economically beneficial and productive use of the Property. Lucas v. So. Carolina Coastal Council, 505 U.S. 1003, 1015 (1992).

While temporary takings are not "different in kind from permanent takings...[q]uite different questions . . . would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances and the like." First Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304, 319, 321(1987). Since Zora's property was not permanently destroyed by natural forces during the appeals process and the Town did not cause the delay inherent in the DEP appeal mechanism, Zora must exhaust its administrative and judicial remedies in order to claim the Town has achieved a regulatory taking in any way.

"Mere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are incidents of ownership" and cannot be considered a taking. Agins v. Tiburon, 447 U.S. 255, 263 (1980). Zora does not specify facts indicating their case falls within the "narrow 'futility exception' to the final decision requirement for takings claims." Wilson v. Commonwealth, 31 Mass. App. Ct. 757, 766 (1992), quoting Gilbert v. Cambridge, 932 F.2d 51, 60-63 (1st Cir.), cert. denied, 112 S.Ct. 192 (1991). In addition, Massachusetts affords Zora a full judicial and administrative mechanism to challenge the Orders of Conditions. Indeed, Zora used the DEP appeals process to their benefit by seeking and obtaining Superseding Orders of Conditions from the DEP overruling the Commission's decisions denying approval of Lot 3 and the road extending to the 15-lot subdivision.

Zora has failed to exhaust their administrative and judicial remedies with respect to the three proposed projects. With respect to Lot 3, the Superior Court judge affirmed the ALJ decision and dismissed Zora's taking claim against the DEP, pointing out that Zora may still perform additional testing in order to demonstrate its waste disposal system will comply with Title V and thus consistent with the Wetlands Protection Act. Similarly, Zora may still submit plans for the 15-lot subdivision and the 21-lot subdivision which include pertinent information such as appropriate wetlands delineations in order to comply with the Wetlands Protection Act. Both Orders of Conditions issued for the 15 lot subdivision and the Superseding Order of Conditions issued for the 21 lot subdivision denied the projects without prejudice.

While the DEP appears to have exceeded the 70-day limitation in issuing Superseding Orders of Conditions in the three proposed projects, this delay is not caused by the Town.

Even if the Town knew of the DEP delay when it denied approval of the projects, Wilson's holding is very limited. The "taking-by-delay" claim recognized by Wilson does not include a claim against a town with mere knowledge of administrative delay. While Zora outlines several instances where the Commission or its members expressed knowledge of the DEP delay and possible use of this delay, Zora shows no facts indicating the Town caused the DEP delay as required by Wilson. The Commissions mere hope to see Zora's projects fail cannot be the sole basis for a temporary taking claim. Courts recognize that delay is inherent in the permitting process and generally refuse to allow takings claims on this basis. See eg. 1902 Atlantic Ltd. v. United States 26 Cl. Ct. 575, 582 (1992) (four and one half years to obtain wetlands permit not extraordinary delay).

Given the attending circumstances demonstrating that the Town did not cause the DEP delay, that Zora's property was not permanently destroyed making exhaustion of administrative remedies ineffectual, and that Zora failed to exhaust its remedies, the Town is not responsible for a taking of Zora's property.

B. Claims of Due Process Violations.

In their complaint. Zora states the Town and its officials entered into a scheme to prevent use by Zora of the Property. Zora asserts that this "scheme" along with the denial of the three proposed projects manifests a violation of due process.[14]

1. Substantive Due Process.

The Fourteenth Amendment's due process clause states, "nor shall any state deprive any person of life, liberty, or property without due process of law." U.S. Const. Amend. XIV. This

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[14] Zora does not challenge the Town's argument that the actions of Town officials do not amount to a violation of substantive due process, but instead asserts that Zora has viable procedural due process claims.

guaranty "demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be obtained." Pruneyard Shopping Center v. Robins, 447 U.S. 74, 84-83 (1990). A violation of substantive due process requires misconduct that is "stunning, evidencing more than humdrum legal error." "The threshold for establishing the requisite 'abuse of government power' is a high one indeed." Nestor Colon Medina & Sucesores, Inc. v. Custodio, 964 F.2d 32, 45 (1st Cir. 1992).

First Circuit cases find that a violation of substantive due process involves circumstances of a truly horrendous nature. "Property is not denied without due process simply because a local planning board rejects a proposed development for erroneous reasons or makes demands which arguably exceed its authority under... state statutes." Creative Environments v. Estabrook, 608 F.2d 822, 832 n.9 (1982), cert. denied, 459 LT.S. 989 (1982). Even a bad faith violation of state law is not sufficiently conscience shocking to rise to the level of a violation of substantive due process. Amsden v. Moran, 904 F.2d 748, 757 (1st Cir. 1990), cert. denied, 498 U.S. 1041 (1991). The First Circuit has recognized violations of due process by Town boards in "truly horrendous" situations, for example, where a board delays approval of projects by deliberately and knowingly flouting state court orders and, due to special circumstances, the state courts were then unavailable to correct the wrong. Roy v. City of Augusta. Maine, 712 F.2d 1317, 1523 (1983); Chiplin Enters., Inc. v. Lebanon, 712 F.2d 1524, 1528 (1st Cir. 1983).

A full administrative and judicial relief mechanism is available to Zora for review of the Commission's decisions. While the DEP has slowed Zora's plans in progressing with the proposed projects, the Town has not been involved in truly

horrendous situations amounting to violations of substantive due process. The Town has not intentionally and arbitrarily disregarded state court orders or left Zora in the situation where the State courts cannot review the Commission's orders. Indeed, Zora has used the review process afforded by the DEP to their advantage with respect to Lot 3 and the 15 lot subdivision. "Every appeal by a disappointed developer from an adverse ruling by a local Massachusetts . . . board necessarily involves some claim that the board exceeded, abused or "distorted" its legal authority in some manner, often for some allegedly perverse (from the developer's point of view) reason." Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 833 (1st Cir. 1982), cert. denied, 459 U.S. 989 (1982). Generally, where state administrative and judicial relief is available for review of local board decisions, due process claims may not be used to address local planning disputes. Nestor Colon Medina & Sucesores, Inc., v. Custodio, 964 F.2d 32, 45 (1st Cir. 1992). The "forced" appeals taken by Zora in connection with the Commission's Order of Conditions denying the three projects do not rise to the level of substantive due process violations.

Similarly, the statements made by Commission members, even when collectively considered with the denial of the three proposed projects, do not rise to the level of truly horrendous behavior on the part of the Town. Specifically, questioning Zora's test results, making statements including, "Zora is going to find out that he isn't going to be able to do anything he wants to do", "In dealing with Mr. Zora you should get a good lawyer ... and to be very careful in dealing with him," informing potential buyers that the Property has wetlands problems, and alleging to the DEP that Zora was altering a B.V.W., are not situations which rise to the level of corrupt, egregious or conscience shocking behavior. Rosenfeld v. Board of Health of Chilmark, 27 Mass. App. Ct. 621, 628 (1989) (denied renewal

of sewage disposal permit where other property owners obtained successive renewals after submitting information equal to or less than that provided by plaintiff did not amount to egregious conduct that shocks the conscience); K. Hovnanian at Taunton, Inc. v. Taunton, 37 Mass. App. Ct. 639, 647 (1994). Finally, the denial by the Board of Health of a variance for Lot 3 is similarly lacking in conscience shocking caliber. The denial of a variance by itself does not amount to misconduct, much less behavior which is "truly horrendous." Amsden v. Moran, 904 E.2d 748, 757 (1st Cir. 1990), cert. denied, 498 U.S. 1041 (1991); Nestor Colon Medina & Sucesores, Inc. v. Custodio, 964 F.2d 32, 45 (1st Cir. 1992).

2. **Procedural Due Process**

In the absence of a substantive due process claim, Zora asserts that the Town violated its procedural due process rights. Procedural due process requires that, before the state significantly deprives an individual of liberty or property, the individual must receive notice and an opportunity to be heard "at a meaningful time and in a meaningful manner." Arnsden v. Moran. 904 F.2d 748, 753 (1st Cir. 1990), cert. denied, 498 U.S. 1041 (1991), quoting Armstrong v. Manzo, 380 U.S., 454, 552 (1965). Zora claims the process afforded was meaningless due to the unreasonable delay in DEP proceedings. In the context of pre-deprivation procedures, where the adequacy of permitting procedures is not in question, but instead the conduct of state officials is allegedly abusing these procedures is challenged, no additional pre-deprivation process is required. PFZ Properties, Inc. v. Rodriguez, 928 F.2d 28,31(1st Cir. 1991); Nestor Colon Medina & Sucesores, Inc.v. Custodio, 964 F.2d 32, 40 (1st Cir. 1992). Zora does not challenge the constitutionality of the administrative procedures, therefore, the pre-deprivation procedural due process afforded Zora is adequate. Nestor Colon Medina & Sucesores, Inc. v. Custodio,

supra at 40 (procedural due process rights of landowner not violated by allegations of several year delay in denying permits and claims that officials acted under malign influence of the governor and other politicians).

With respect to the post-deprivation hearings provided by the DEP, Zora was likewise provided adequate process. While promptness and sufficiency of administrative review are significant factors in assessing adequacy of procedural process, delays in the DEP process are not the result of the Town's actions. Behan v. City of Dover, 419 F. Supp. 562, 568 (1976). "Where a state has provided reasonable remedies to rectify a legal error by a local administrative body.. . due process has been provided." Creative Environments v. Estabrook 508 F.2d 822, 832 n. 9 (1982), cert. denied, 459 U.S. 989 (1982). Zora has the opportunity to present its allegations before administrative and judicial bodies of the Commonwealth that the Town through the Commission contributed to the DEP delay by denying its projects and made unreasonable demands for plans and requests for unlimited access in order to intimidate Zora. The fact that the DEP, an Administrative Law Judge, the Superior Court or the Appeals Court denied Zora relief from any one decision does not affect the adequacy of the process provided to Zora. PFZ Properties, Inc. v. Rodriguez, 928 F.2d28, 31 (1st Cir. 1991).

The First Circuit has consistently held that claims "too typical of the run of the mill dispute between a developer and a town planning agency do not rise to the level of a due process violation. Creative Environments. Inc., v. Estabrook, supra at 833. In this case, Zora has been afforded both procedural and substantive due process.

C. **Violations of c. 12 § 11I.**

Zora further claims violations under the Massachusetts Civil Rights Act, G.L. c. 12, §11I[15]. This claim requires Zora to establish that "(1) [their] exercise or enjoyment of rights secured by the

Constitution or laws of either the United States or of the Commonwealth, (2) has been interfered with, or attempted to be interfered with, and (3) that the interference or attempted interference was by "threats, intimidation or coercion." Bally v. Northeastern University, 403 Mass. 713, 717 (1989).

Zora's rights under either the United States Constitution or the Constitution of the Commonwealth have not been interfered with or attempted to be interfered with by the Town.[16] Clearly, Zora has not established any due process violation. Instead, Zora asserts that the Town threatened to appeal unless Zora allowed unlimited access to their property, a violation, Zora claims, of their Fourth Amendment Right against unreasonable search and seizure.[17] While members of a conservation

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[15] G.L. c. 12, § 11I provides in pertinent part "Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with . . . may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief. . ."

[16] State remedies provided by G.L. c. 12, § 11I for civil rights deprivations are coextensive with 42 U.S.C. § 1983. Batchelder v. Allied Stores Corp., 393 Mass. 819, 822-823 (1985).

[17] The Fourth Amendment provides in pertinent part "the right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures..." U.S. Const. Amend. IV.

commission do not have unlimited right of access to private land for the purposes of inspecting for general violations of law, under G.L. c. 131, § 40, conservation commission members may enter property for the purposes of performing their duties under Wetlands Protection Act. Commonwealth v. John G. Grant & Sons. Inc., 403 Mass. 151, 159-160 (1988) (holding that G.L. 131, § 40 does not authorize a conservation commission or its agents to enter private land to inspect for general violations of law.) Under G.L. c. 131, § 40, the Commission's duties include determining whether a
Notice of Intent filed by an applicant, such as Zora, warrants approval.

Zora's reliance upon Grant is misplaced both in fact and in law. First, Grant does not bar all access by Commission members to the subject property, but only that conduct amounting to a warrantless search of unlawful conduct. The Commission's activities clearly fall under the duties provided for under G.L. c. 131, § 40, and were not general searches for unlawful activities.

Moreover, Zora asserts that the Commission threatened to appeal if Zora sought a DEP Superseding order overturning the Commission's decision in denying the proposed extension of a road for the 15 lot subdivision unless the Commission gained unlimited access. While the Commission denied the project for several reasons including lack of access to the property, the DEP's decision in allowing the project also required as a special condition for the project that members and agents of the local conservation commission and the DEP have the right to enter and inspect the property at all reasonable times to evaluate compliance with the Superseding Order of Conditions. Further, Zora fails to indicate facts demonstrating that the Commission actually gained any access in this instance. For these reasons,

Zora cannot establish interference with a constitutional right.

Zora also fails to establish interference through "threats, intimidation or coercion." The definition of coercion under G.L. c. 12, § 11I, does not necessarily involve physical force. See Redgrave v. Boston Symphony Orchestra, Inc., 399 Mass. 93, 100 (1987); Freeman v. Planning Board of West Boylston, 419 Mass. 548, 566 n. 18 (1995). The actions of the Commission in appealing DEP orders were legitimate and justifiable, therefore, the Commission's acts do not amount to "threats, intimidation and coercion." Freeman v. Planning Board of West Boylston, supra at 566 (planning board erroneously seeking concession legitimately related to purposes of subdivision control law did not exercise coercion against plaintiff to force plaintiff to forego development of property.) Even if the Commission threatened to appeal on the sole basis of lack of access to the property, the Commission's conduct would not be coercive. The Commission's statements and decision were not threats of retributive action for lawful conduct on the part of Zora. See Tortora v. Inspector of Buildings of Tewksbury, 41 Mass. App. Ct. 120, 123 (1996) (threats of retributive arrest or official action for lawful conduct including putting a nail in building or applying for permit in town was sufficient to survive summary judgment). The actions of the Commission and the behavior of its members do not suggest coercion at any level. Freeman v. Planning Board of West Boylston, supra at 566 (1995). Accordingly, Zora cannot establish a claim against the Town for violations compensable under G.L. c. 12, § 11I.

D. Intentional Interference with Contractual Relations and Intentional Interference with Advantageous Relations.

The Town asserts that in the absence of proof of improper or wrongful conduct by the Town, the Commission, the Board of

Health, or its members, Zora cannot establish a claim for intentional interference with a contractual or prospective contractual relation. In addition, the Town maintains the statute of limitations bars any claim of interference with the exception of claims involving the denial of a variance by the Board of Health and the Orders of Conditions issued by the Commission for the 15 lot and 21 lot subdivisions. Zora argues that the Town fails to address their claim for intentional interference with advantageous relations. Both claims require proof of improper motive or means which Zora advances is a factual question to be decided only by a jury. Zora claims the actions of the conduct amount to a continuing scheme thereby constituting a continuing tort which the three year statute of limitations would not bar.

The intentional torts of intentional interference with a contractual relation and intentional interference with an advantageous business relation both require proof of improper motive or means. United Truck Leasing Corporation v. Geltman, 406 Mass. 811, 816 (1990).[18] Therefore, in the absence of bad motive or means, either claim will fail.

Any action by the Town, its agencies or officials considered as a single act or collectively does not amount to improper motive or means. The standard adopted for improper motive or

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[18]The elements of intentional interference with a contract are: 1.) contract with a third party; 2.) defendant's conduct was intentional and improper in motive or means; and 3.) plaintiff was harmed by defendant's actions. United Truck Leasing Corporation v. Geltman, 406 Mass. 811, 812 (1990). The elements of intentional interference with an advantageous business relation are: 1.) business relationship or contemplated contract of economic benefit; 2.) defendant's knowledge of such relationship; 3.) defendant's intentional interference was improper in motive or means; and 4.) plaintiffs loss of advantage directly resulted from defendant's conduct. Comev v. Hill, 387 Mass. 11, 19 (1982); United Truck Leasing Corporation v. Geltman, 406 Mass. 811, 816 (1990).

means is met when interference resulting in injury is wrongful by some measure beyond the fact of the interference itself. United Truck Leasing Corporation v. Geltman, 406 Mass. 811, 81 6 (1 990), quoting United Truck Leasing Corporation v. Geltman, 26 Mass. App. 847, 852 n.2. (1989), citing Top Serv. Body Shop,Inc. v. Allstate Ins. Co., 283 Or. 201 909210 (1978). Zora claims the Town and its official entered into an ongoing scheme to prevent Zora's use of the Property. Zora fails to establish that any statements made by Commission members were intentionally false or that decisions made by the Commission or the Board of Health were intentionally erroneous. Draghetti v. Chmielewski, 416 Mass. 808, 817 (false statements made by employer were sufficient to establish improper means; decision to terminate employee based on retaliation or ill will was adequate to prove improper motive.) Zora has not established that the Commission or its members engaged in threats or violations of statutes or rules of law. United Truck Leasing Corporation v. Geltman, supra at 817. Finally, Zora has not proved that the Town, the Board of Health, or the Commission had a duty of non-interference "i.e., that [the Town] interfered for an improper purpose rather than for a legitimate one. United Truck Leasing Corp. v. Geltman, 406 Mass. 811, 816 n.8 (1990). The Commission was required to issue Orders of Conditions upon application by Zora. The Board of Health was required to decide whether a permit should be issued and variances granted for the proposed septic system for Lot 3, again upon Zora's application. No evidence is presented that any interference by the Town was intentional and without legal justification. Grammemenos v. Zolotas, 336 Mass. 594, 597 (1970). The apparent motives of the Commission and the Board of Health in denying the projects were compliance with the Wetlands Protection Act.

While improper motive or means is an issue of fact, where

evidence of conduct construed in the light most favorable to the plaintiff does not, as a matter of law, meet the legal standard of improper motive or means, the plaintiffs claim must fail. See Freeman v. Planning Board of West Boylston, 419 Mass. 548, 561 n. 15 (1995) (due process claims resolved on motion to dismiss or for summary judgment where, as a matter of law, evidence of misconduct, if believed, failed to meet standard of liability.) Here, Zora has not established bad motive or means through any one act or as a collective, ongoing scheme.

The statute of limitations applying to tort actions is three years. G.L. c. 260, § 2A (1992 ed.) Since Zora has not established a continuing tort, the statute of limitations bars consideration of actions which occurring prior to October 3 1, 1987. The remaining actions under consideration are the Board of Health denial of a variance for Lot 3 and the Orders of Conditions issued for the 15-lot and 21-lot subdivision. The statute of limitations bars consideration of the statements made independent of these projects by John Rockwell. Zora still cannot establish bad or improper motive or means based on these remaining decisions, and therefore, fails to establish intentional interference with contractual relations or intentional interference with advantageous relations.

E. Qualified Immunity of John Rockwell

The Town asserts that Commission member, John Rockwell is entitled to qualified immunity from the civil rights actions brought by Zora. The defense of qualified immunity from suit under G.L. c. 12, § 11I, is available to public officials unless the official violated "a right under Federal or State constitutional or statutory law that was 'clearly established' at the time." Duarte v. Healy, 405 Mass. 43, 47 (1989).

The actions and statements attributed to Rockwell are the

following: 1.) a statement implying Zora falsified percolation test data; 2.) a call placed to the DEP alleging Zora was altering a B.V.W. and working in a stream; 3.) a statement to a neighbor of Zora that

Lot A had potential building problems; and 4.) statements that the Commission would appeal if members were not permitted access for the purposes of the Notice of Intent filed for the 15 lot subdivision. Cumulatively, this behavior does not suggest "truly horrendous" conduct as required for violations of due process. Rockwell's conduct would not suggest a violation of Zora's clearly established constitutional rights since a reasonable person in Rockwell's situation would not believe that his conduct violated a constitutional right.

Zora contends that Commonwealth v. John G. Grant, Inc. specifically prohibits unlimited access to property by a conservation commission as a violation of the Fourth Amendment and Article 14. While Grant does forbid warrantless searches for general violations of law, Grant does not clearly establish a right by property owners to be completely free from entrance by the conservation commission. Rockwell as a conservation commission member still retained duties as outlined under the Wetlands Protection Act, including entering upon land for the purposes of addressing Zora s Notices of Intent. Therefore, Rockwell is immune from suit for the civil rights violations claimed by Zora under the doctrine of qualified immunity.

F. Zora's Eminent Domain Claim

General Laws c. 79, § 10 provides the procedures to be followed by a property owner in claiming damages for the taking of property. As decided above, Zora has not established a taking without just compensation under the Fifth Amendment and

therefore cannot recover damages under G.L. c. 79.

G. Declaratory Judgment

Zora seeks declaratory judgment under G.L. 23 1A, on the following issues:

> [1. W]hether the Conservation Commission has an absolute right to go onto the plaintiffs property without the plaintiffs being present and without their knowledge; and without showing any just cause or reasonable reason to be on the property. ..
>
> [2. W]hether the plaintiffs may object to any member sitting in judgment on a matter if the member has shown a lack of impartiality...
>
> [3. W]hether the Conservation Commission can insist that the plaintiffs prepare plans for the use of the Conservation Commission without the Conservation Commission compensating the plaintiffs..
> [and]
> [4. W]hen and at what times the Conservation Commission can conduct its on-site inspections.

Declaratory judgment is appropriate for the resolution of real, not hypothetical or moot controversies. Therefore, an actual controversy must be specifically set forth in the pleadings, pursuant to G.L. c. 231A. Mass. Assoc. of Ind. Ins. Agents and Brokers v. Comm'r of Ins., 373 Mass. 290, 292 (1977); Quincy City Hospital v. Rate Setting Comm'n, 406 Mass. 431, 439 (1990). A court action cannot concern hypothetical controversies, but rather must involve an issue which when decided will have an "immediate impact" on the litigants. Mass. Assoc. of Ind. Ins. Agents and Brokers v. Comm'r of Ins., supra at 292.

The questions presented for declaratory judgment by Zora are hypothetical and not of current concern. This is not a case where "unless the matter is adjusted such antagonistic claims will almost *immediately* and inevitably lead to litigation." (emphasis added). Bunker Hill Distributing Inc., v. District Attorney for the Suffolk District, 376 Mass. 142, 144 (1978), quoting School Comm. of Cambridge v. Superintendent of Schools of Cambridge, 320 Mass. 516, 518 (1946). Whether the Commission has an absolute right to enter Zora's property without their knowledge and when and at what times on-site inspections can occur involves facts which arose in 1989, and resolution of these issues is purely hypothetical at this point in time. Similarly, questions regarding the impartiality of Commission members and requests for additional plans relating to consideration of Notices of Intent are not matters of current concern.

Zora presents questions too stale for declaratory judgment purposes. Cleary v. Comm'r of Public Works, 21 Mass. App. Ct. 140, 150 (1 985) (questions presented concerning delay by Department of Public Welfare in processing claims for food stamps occurring number of years earlier were too stale for declaratory judgment.) Since resolution of Zora's questions will not immediately impact Zora's rights with respect to the Property, declaratory judgment is inappropriate. Mass. Assoc. of md. Ins. Agents and Brokers, Inc. v. Comm'r of Ins., 373 Mass. 290, 292 (1977).

H. Conclusion

Zora fails to establish a claim that the Town took the Property without just compensation through delay in administrative proceedings. In the absence of a taking claim, Zora cannot receive compensation from the Town under G.L. c. 79.

Furthermore, Zora fails in establishing any violation of Zora's civil rights under the United States Constitution or Massachusetts Constitution and, therefore, cannot succeed in an action under G.L. c. 12, § 11I. Rockwell is entitled to qualified immunity for the civil rights actions brought by Zora. Zora lacks any basis for claiming intentional interference with contractual or advantageous relations. Lastly, the hypothetical questions presented by Zora are inappropriate in this action for declaratory judgment. For the foregoing reasons, summary judgment for defendant is allowed on all counts of plaintiffs Second Amended Complaint.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that summary judgment enter for defendants, Town of Marion and John Rockwell.

/s/ Gerald F. O'Neill, Jr.
GERALD F. O'NEILL, JR.
Justice of the Superior Court

DATED: November 26, 1996

APPENDIX B

Commonwealth of Massachusetts
Appeals Court for the Commonwealth
At Boston

In the case no. 97-9-324

ZORA ENTERPRISES INC. & others

vs.

TOWN OF MARION & another.

Pending in the Superior
Court for the County of Plymouth
Ordered, that the following entry be made in the docket:

Judgement affirmed

by the Court,

/s/Ashley Ahearn
ASHLEY AHEARN
Clerk

Date: **March 30, 1999**

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

97-P-324

ZORA ENTERPRISES, INC. & other[1]

vs.

TOWN OF MARION & another[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiffs appeal from the entry of summary judgment in the defendants' favor on the plaintiffs' claims that the defendants used the Department of Environmental Protection's administrative appeals process to delay the development of the plaintiffs' subdivision lots. Primarily for the reason that the plaintiffs failed to show the town was responsible for delays of the DEP, a summary judgment by the defendant was rightly allowed.

We touch briefly on certain points the plaintiffs raise on appeal which were not specifically addressed by the Superior Court judge.

1. The materials upon which the judge relied were appropriate sources under Mass.R.Civ.P. 56(c), 365 Mass. 824 (1974). See, e.g., White v. Peabody Constr. Co., 386 Mass. 121, 126-127 (1982); Correllas v. Viveiros, 410 Mass. 314, 317 (1991); Brookline v. Medical Area Serv. Corp., 8 Mass. App. Ct. 243, 245 & n.4 (1979).

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[1] Joseph P. Zora and Glenna M. Zora.

[2] John Rockwell.

2. We do not view the judge's statement that the plaintiffs must exhaust their administrative remedies before bringing a regulatory taking claim as cause for reversal, considering the context in which the statement appears. Because the parties were already in the midst of the administrative appeals process, and because the plaintiffs' claims did not come under the narrow holding of Wilson v. Commonwealth, 413 Mass. 352, 355 (1992), we read the judge's remarks as merely reiterating that the plaintiffs must complete those proceedings before they could prove that the town had pursued the administrative appeals in bad faith. In the same vein, the judge's observation that the plaintiffs had failed to show that they had been deprived of all economically beneficial use of their property was again made in response to the plaintiffs' reliance on Wilson v. Commonwealth, supra, and would not preclude the plaintiffs from attempting to prove their loss in the appropriate proceeding.

3. The plaintiffs' claims for intentional interference with contract and advantageous relations were appropriately resolved on summary judgment. The comments made by various members of the Marion conservation commission regarding problems with the plaintiffs' development plans would not support the inference that the defendants' motives were inconsistent with the town's duty to ensure compliance with wetlands regulations and to pursue its rights of appellate review. See generally United Truck Leasing Corp. v. Geltman, 406 Mass. 811, 815-817 (1990); Duiqarian v. Stone, 420 Mass. 843, 852 (1995); W. Oliver Tripp Co. v. American Hoechst Corp., 34 Mass. App. Ct. 744, 752 (1993). The plaintiffs' remaining arguments were adequately dealt with by the Superior Court judge. For essentially the reasons set forth in the judge's comprehensive memorandum of decision and order on the defendants' motion for summary judgment, dated November

26, 1996, we affirm the judgment.

Judgment affirmed.

By the Court
(Kass, Beck & Spina, JJ.),

/s/ Ashley Ahearn
ASHLEY AHEARN
Clerk

Entered: March 30, 1999

APPENDEX C

Supreme Judicial Court for the
Commonwealth of Massachusetts
1412 Courthouse, Boston, Massachusetts 02108
(617) 557-1020

Donald J. Fleming, Esquire
Fleming & Ishihara
86 Church Street
P.O. Box 396
Mattapoisett, MA 02739

RE: Docket No. FAR-10560

ZORA ENTERPRISES, INC. & others
vs.
TOWN OF MARION & another

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that the above-captioned Application for Further Appellate Review has been considered by the Court and is denied.

Jean M. Kennett, Clerk

Dated: **May 28, 1999**

To: Donald J. Fleming, Esquire
Samuel Perkins, Esquire